Supreme Court, U.S.
FILED
SEP 11 1998
CLERK

(3)

No. 98-271

In the Supreme Court of the United States

OCTOBER TERM, 1997

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON AND CERTAIN LONDON MARKET INSURANCE COMPANIES,
PETITIONERS

v.

INDIANA GAS COMPANY, INC., RICHMOND GAS CORPORATION d/b/a INDIANA GAS COMPANY, INC., AND TERRE HAUTE GAS CORPORATION d/b/a INDIANA GAS COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS INDIANA GAS COMPANY, INC., RICHMOND GAS CORPORATION, AND TERRE HAUTE GAS CORPORATION

Edward P. Henneberry
Mark I. Levy
Counsel of Record
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Counsel for Respondents Indiana Gas Company, Inc., Richmond Gas Corporation, and Terre Haute Gas Corporation

9 pp

RULE 29.6 STATEMENT

Respondent Indiana Gas Company, Inc. is a wholly-owned subsidiary of Indiana Energy, Inc., a publicly held corporation traded on the New York Stock Exchange. Respondents Richmond Gas Corporation and Terre Haute Gas Corporation are wholly-owned subsidiaries of Indiana Gas Company, Inc.

TABLE OF CONTENTS

STATEMENT.....1

REASONS FOR DENYING THE WRIT 2

CONCLUSION.....5

TABLE OF AUTHORITIES

Page(s)

CASES

Certain Interested Underwriters at Lloyd's v. *Layne*, 26 F.3d 39 (6th Cir. 1994) 2, 3

Indiana Gas Co. v. *Home Ins. Co.*, No. 79D02-9806CP100 (Tippecanoe, Ind. Super. Ct. No. 2, filed June 9, 1998) 2

RULES

Fed. R. Civ. P. 23.2 ..... 4, 5

S. Ct. R. 12.6 1

S. Ct. R. 15.2 4

S. Ct. R. 24.1(b) 1

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 98-271

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON AND CERTAIN LONDON MARKET INSURANCE COMPANIES,
PETITIONERS

v.

INDIANA GAS COMPANY, INC., RICHMOND GAS CORPORATION d/b/a INDIANA GAS COMPANY, INC., AND TERRE HAUTE GAS CORPORATION d/b/a INDIANA GAS COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS INDIANA GAS COMPANY, INC., RICHMOND GAS CORPORATION, AND TERRE HAUTE GAS CORPORATION

STATEMENT

Respondents Indiana Gas Company, Inc., Richmond Gas Corporation, and Terre Haute Gas Corporation (collectively "Indiana Gas") respectfully oppose the petition for a writ of certiorari.[1] Indiana Gas agrees with petitioners ("London") that the decision of the Seventh Circuit is

[1] As explained in the petition (Pet. ii), various non-London insurance companies were named as defendants in the district court and were appellees in the court of appeals. These non-London insurers are not petitioners in this Court and are not included in this brief in opposition filed by Indiana Gas. See Sup. Ct. R. 12.6, 24.1(b).

erroneous and that the citizenship of a Lloyd's Syndicate for purposes of diversity jurisdiction is determined by the citizenship of the Active Underwriter rather than by the citizenship of each individual Name in the Syndicate. Moreover, Indiana Gas agrees, as the Seventh Circuit itself acknowledged (Pet. App. 9a-11a & n.†), that the decision below conflicts with the holding in *Certain Interested Underwriters at Lloyd's* v. *Layne*, 26 F.3d 39 (6th Cir. 1994). Nonetheless, Indiana Gas urges that this case does not warrant further review and accordingly that certiorari be denied.

REASONS FOR DENYING THE WRIT

Despite the erroneous decision below and the existence of a circuit conflict, Indiana Gas submits that it is neither necessary nor appropriate for the Court to take up this case to resolve the legal issue presented by London.

First, there is nothing in the circumstances of this case that would call for further review. The Seventh Circuit's jurisdictional decision had the effect of vacating the district court's various rulings that incorrectly granted summary judgment against Indiana Gas. Moreover, following the Seventh Circuit's decision, Indiana Gas as the plaintiff below has re-filed its complaint in Indiana state court. See *Indiana Gas Co.* v. *Home Ins. Co.*, No. 79D02-9806CP100 (Tippecanoe, Ind. Super. Ct. No. 2, filed June 9, 1998).[2] That pending suit is fully adequate to resolve the insurance coverage dispute between the parties under Indiana law and raises no issue of federal diversity jurisdiction. Accordingly, in light of Indiana Gas's filing of that suit,

---

[2] London has filed its answer in that case and moved to stay proceedings pending this Court's disposition of its petition for certiorari.

adjudication of the controversy between the parties does not require this Court's intervention.

Second, as the petition indicates, the question of the citizenship of a Lloyd's Syndicate for purposes of diversity jurisdiction has been decided by only the Sixth and the Seventh Circuits. Decisions of other courts of appeals in addition to *Layne* and the ruling below would be of substantial assistance to this Court in analyzing the question presented. This is particularly so since London relies on the holding in *Layne* to establish a conflict but expressly disavows the Sixth Circuit's legal analysis. See Pet. 16 n.12. Likewise, in the Seventh Circuit, Indiana Gas and London agreed that there was diversity of citizenship among the parties but advanced different legal rationales. In these circumstances, further analysis and clarification of the issue in the courts of appeals would benefit this Court's consideration. As the petition notes (Pet. 13), the issue currently is pending in several cases in the Second and Third Circuits. Those decisions are likely to better illuminate the question presented for the Court and provide suitable vehicles for the prompt resolution of this issue.

Third, London's position on the citizenship of a Lloyd's Syndicate appears to turn on the antecedent proposition that the Seventh Circuit erred in concluding that the individual Names were not and could not be defendants in litigation under the insurance policies. Indeed, no fewer than five times in its 10-page argument does London assert this point (Pet. 14, 14-15 n.11, 17, 20 & n.18), and stresses that it was "[t]his misunderstanding" over the Names' status that "led" the court of appeals to its erroneous analysis of the citizenship of a Lloyd's Syndicate. *Id.* at 14. However, the question whether individual Names were and could be sued as defendants was not briefed by London in the court below (or, for that matter, in its petition for certiorari in this Court).

Moreover, the issue appears to be entirely a question of English law. See Pet. 5a, 6a, 9a-10a. Thus, whether or not London is ultimately correct on that issue, the fact that it was not briefed in the court of appeals, and that London's position on the question presented in the petition depends upon resolution of a precedent issue of English law that is not itself certworthy, strongly militate against further review here.

Fourth, with respect to the second question presented involving Fed. R. Civ. P. 23.2, this Court's review is not called for. To begin with, this issue was not raised in the court of appeals until London's rehearing petition and therefore was not adequately preserved.[3] Although London now tries to defend its belated assertion of the issue below (Pet. 19-20 & n.16), there is no reason why London could not have raised it as an alternative argument in its initial post-argument brief on the question of diversity jurisdiction. See S. Ct. R. 15.2.

Nor, contrary to London's characterization (Pet. 19), did the court of appeals relieve London of this procedural default by deciding the issue on the merits. Rather, the court held that London's argument had been "forfeited" (Pet. App. 94a) and then went on to "add" that the argument was unavailing in any event. *Ibid.* Such an alternative ruling does not forgive London's waiver, and the court of appeals' waiver analysis constitutes an adequate ground independent of the merits for its rejection of London's Rule 23.2 argument. Indeed, the only reason the Seventh Circuit addressed the merits at all was not to benefit or excuse London but instead to forestall "another round of litigation" in which Indiana Gas as the plaintiff would seek to rely on

---

[3] For this reason, Indiana Gas took no position on the Rule 23.2 issue.

Rule 23.2 to establish federal jurisdiction for its complaint. *Ibid.*

Finally, the court of appeals correctly observed that Indiana Gas's complaint simply "did not use Rule 23.2." Therefore, whatever the merits of London's argument might be in the abstract, it has no bearing here because "Rule 23.2 was not used * * * in this case, and that is that." Pet. App. 94a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

Edward P. Henneberry
Mark I. Levy
Counsel of Record
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Counsel for Respondents
Indiana Gas Company, Inc.,
Richmond Gas Corporation, and
Terre Haute Gas Corporation

SEPTEMBER 1998